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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
CHAMELEON RADIO CORPORATION) MM Docket No. 96-173
)
Order To Show Cause Why the License)
of Station KFCC(AM), Bay City, Texas,)
Should Not Be Revoked)

To: The Commission

**MASS MEDIA BUREAU'S COMMENTS IN SUPPORT OF SUPPLEMENTED
REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

1. On November 23, 1998, Chameleon Radio Corporation ("Chameleon") filed a supplement to Chameleon and Bernard Smoots' ("Chameleon and Smoots") June 18, 1998, Reply to Opposition to Petition for Reconsideration ("Reply"). The Mass Media Bureau offers the following comments in support of the Reply and its Supplement.

2. By way of background, in a May 22, 1998, Petition for Reconsideration, Chameleon requested permission for a post-revocation distress sale of KFCC(AM), Bay City, Texas, to Smoots. In the *Initial Decision*, 12 FCC Rcd 19348 (1997), Chief Administrative Law Judge Joseph Chachkin, had recommended revocation of Chameleon's license to operate the station, and the Commission had affirmed. *Chameleon Radio Corporation*, 13 FCC Rcd 13549 (1998). The Bureau did not find Chameleon's argument in favor of a post-revocation distress sale sufficient to overcome the precedent and public policy considerations weighing against it. See Mass Media Bureau's Opposition to Petition for Reconsideration, MM Docket 96-173, filed June 1, 1998. Chameleon has now withdrawn its distress sale request and, along

with Smoots, submits a request with documentation for approval of a sale for a portion (fifty-eight percent) of its reasonable and prudent expenses. The proposed consideration amounts to approximately thirty percent of the station's actual value. We support the new proposal.

3. We had three previous concerns. First, the proposal did not comport with distress sale precedent. *See Stereo Broadcasters, Inc.* 74 FCC 2d 543 (1979), *affirmed Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981). ("*Stereo*"). In *Stereo*, the Commission was concerned that a post-hearing distress sale would not conserve the resources expended in an administrative hearing. It also considered speculative the argument that permitting the distress sale would prevent delay of service resulting from any future comparative hearing.

4. We are no longer, however, dealing with a distress sale. In a distress sale, the price must not exceed seventy-five percent of appraised value, and the minority status of the proposed assignee is the only other requirement distinguishing it from non-distress sales. Furthermore, there is no indication in *Stereo* that the community in question risked losing a station but for the sale. In the instant case, without the sale, Bay City will almost certainly lose a station. *See* paragraph 8, *infra*. *Stereo* is, therefore, distinguishable and not a bar to the sale in the instant case.¹

5. Second, we were concerned that grant of the requested sale would undermine the distress sale policy by leading broadcasters to try to prevail in a full hearing before proposing

¹ We note that in *SL Communications Inc. v. FCC*, No. 98-1076 (D.C. Cir. March 19, 1999), the U.S. Court of Appeals upheld the Commission's rejection of a settlement under which a disqualified applicant for a new station would substitute another applicant in its place in return for payment of less than the disqualified applicant's expenses. The case is distinguishable because it involved a proposed new service, not a licensed, operating station.

a sale. We believe now that the very substantially lowered price here would not induce other broadcasters to ignore the distress sale option in favor of a costly hearing even in the unlikely event that they met all the criteria of the instant case. Furthermore, a licensee risks disqualification in a hearing. In a distress sale, questions about the licensee's qualifications remain unresolved. We do not believe that the possibility of selling for such a reduced price would likely induce parties to risk the expense and consequences of a hearing.

6. Our third concern was that, in light of Chameleon's failure to place an adequate signal over Bay City and its attendant misrepresentations, the AM buyer would not serve its community of license. We are convinced, however, by the representations that Smoots has made in the latest submission, that he sincerely intends to serve Bay City. Nothing in the record or known to the Commission gives us reason to doubt his sincerity.

7. In addition to resolving our previous concerns, the latest pleading details unique circumstances that, taken together with the very low sales price, justify approval of the proposed sale.

8. Of primary importance, Chameleon and Smoots state that the proposed sale will prevent Bay City from losing its only AM station and one of only three stations in the community. The engineering exhibit provided by Chameleon and Smoots demonstrates that KFCC(AM) creates an overlap that at one time was permitted, but is now prohibited under Section 73.37(a) of the Commission's Rules. Consequently, it is unlikely to be reassigned to a licensee operating in the Bay City area. Chameleon and Smoots cite *WNAR*² and *Golden*

² 27 RR 2d 1119, 1124 n.8(1973)

*Broadcasting, Inc.*³ for the proposition that the Commission has a longstanding policy of not removing a station from a community with very few outlets.

9. The cases *Chameleon* and *Smoots* cite, however, although helpful, are not dispositive because they predate the Commission's 1991 AM Band proceeding.⁴ Nevertheless, as the cases indicate and as the Commission acknowledges in the AM Band proceeding, the Commission does, in general, have a policy of not reducing the number of outlets in communities with few stations. In addition, as one court stated, "a curtailment of service ... unless outweighed by other factors, is not in the public interest."⁵ Furthermore, while the Commission said, in the AM band proceeding, that being the first AM local service does not automatically override the public interest considerations in not allowing the interference prohibited in that rulemaking, it clearly left open the possibility that in some cases it would. This precedent indicates that the Commission must balance the public interest in maintaining service and the factors weighing against it.

10. One public interest justification *Chameleon* and *Smoots* offer is that *Smoots* would retain KFCC's minority and foreign language format. The other Bay City licensees both have a country and western format. Bay City is located in Matagorda County. In support of its claim that its community needs its format, *Chameleon* and *Smoots* provide information from the Texas Employment Commission (TEC). According to TEC, as of July 1994, Matagorda County's population is twenty-five percent Hispanic, fourteen percent Black,

³ 68 FCC 2d 1099, 1109 (1978).

⁴ *Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991).

⁵ *Hall v. FCC*, 237 F.2d 567, 577 (D.C. Cir. 1956).

and two percent other minority. We do not find this argument particularly persuasive given our longstanding forbearance in format matters. *See WNCN Listeners Guild*, 450 U.S. 582 (1981).

11. There is, however, strong precedent for valuing the diversity Smoots would bring to broadcasting. Chameleon pointed out in its Petition for Reconsideration that Smoots would be a new entrant to broadcasting. The Commission and the courts have long recognized that increased ownership diversity, and, particularly, new entrant ownership, is a legitimate and important policy objective. *See In Re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 13 FCC Rcd. 21167 (1998) and cases therein. *See also, The Communications Act of 1934, as amended by The Telecommunications Act of 1996*, Section 309(j), 47 U.S.C. Section 309 (j); *Report and Order in the Matter of Implementation of Section 309(j) of the Communications Act*, 13 FCC Rcd 15920, 15995 (1998) (adopting a new entrant bidding credit for mass media ownership).

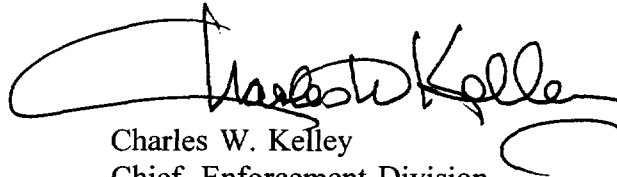
12. Chameleon also argues that the Commission allowed a similar sale in *Cathryn C. Murphy*, 42 FCC 2d 346 (1973), which stands for the proposition that the Commission will in extraordinary circumstances allow a sale after a hearing resulting in denial of renewal or, by logical extension, after revocation.

13. The instant case does present extraordinary circumstances. The sale would provide a new entrant, with the opportunity to buy a station at thirty percent of its appraised value. Thus, not only would the sale prevent a community with only three radio stations from losing one, it would also lead to increased diversity. In these circumstances, given the very low sales price, we believe the balance of competing Commission interests favors approval of

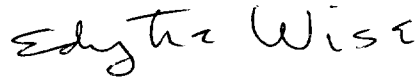
the proposed sale.

14. Accordingly, the Bureau supports grant of Chameleon's request, approval of the sale, and termination of the proceeding.

Respectfully submitted,

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Charles W. Kelley
Chief, Enforcement Division
Mass Media Bureau

A handwritten signature in black ink, appearing to read "Edythe Wise". The signature is written in a cursive, flowing style.

Edythe Wise
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March 31, 1999

CERTIFICATE OF SERVICE

Talya Lewis, a secretary in the Enforcement Division, Mass Media Bureau, certifies that she has on this 31st day of March 1999, sent by regular United States mail copies of the foregoing **"Mass Media Bureau's Comments in Support of Supplemented Reply to Opposition to Petition for Reconsideration"** to:

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Talya Lewis